

\* \* This caase was appealed ;

NO 116. THE HOUSE OF LORDS (7th May 1792) ' ORDERED AND ADJUDGED that the appeal be dismissed, and the interlocutors complained of, be affirmed.'

NO 117. 1791. November 30. JANE DURIE against ALEXANDER COUTTS.

Succession in moveables regulated by the *lex domicilii*.

THOMAS DURIE, whose residence was in the Isle of Man, having occasionally come to Scotland, executed there a trust-deed of settlement in the Scottish form.

In the narrative it is set forth to be his intention, ' That his whole property should be vested in certain trustees; that his houses, &c. should be sold, if they thought fit; and that the produce of his heritable and personal estate should be applied in manner after mentioned.'

It then makes over to the ' trustees, for the use and behoof, in the *first* place, of the heirs of his body, whom failing, of David Durie, whom failing, of Jane Durie and Margaret Durie, equally, and to the longest liver of them, all and sundry heritable subjects that should happen to pertain to him at the time of his death; and particularly, an heritable debt of L. 2000 affecting certain lands in Scotland; together with all and sundry debts and sums of money, as well heritable as moveable,' &c.

And ' full power is granted to the trustees to intromit with, transact, uplift, and discharge the sums and others above disposed.'

The conveyance was burdened, beside the granter's debts, with the payment of various annuities and other legacies.

The succession having devolved to Jane and Margaret Durie, they, being sisters, mutually executed settlements according to the forms of the Isle of Man, where they lived, in favour of each other, and of Jane Durie their mother.

Margaret died several years before her sister Jane, who, immediately before her death, by a nuncupative will, bequeathed her whole effects, real and personal, to her mother. At this time the heritable debt had not been paid to the trustees, as it very soon after was.

Upon the death of Jane a competition for the succession, chiefly in respect to that debt, took place, between her mother, on the one hand, who, by the law of England, was entitled to it, both under her testaments and as legal heir; and, on the other, Mr Coutts, the heir by the law of Scotland; the issue of which depended on this point, Whether the right of Jane, under Mr Durie's settlement, was heritable or moveable. For Jane Durie, the mother, it was

*Pleaded*; ' The distinction of heritable and moveable,' says Lord Stair, ' is derived to rights and obligations, as the matter thereof is heritable or moveable;' b. 2. tit. 1. § 3.

Now, the right which accrued to Jane Durie from the settlement in question, had not for its subject or matter either the whole or a part of any specific effects, whether heritable or moveable, but the residue of their value which should exist after the management of the trustees had ceased. This is apparent from the terms of the deed, which declared, that it was the produce of the whole estate, disposed of at their discretion, by sale or transaction; and not the estate itself, or any portion of it, which was to be applied for the purposes of the trust.

For this produce they were to be accountable to those interested; but over the specific subjects they had in all other respects an absolute power. They might convert the whole of that property into money, or this into other property. They might change heritable subjects into moveable, or moveable into heritable. In short, they were restrained by no obligation but that of restoring the value, and therefore were plainly debtors to that amount, the favoured persons being the creditors. Of these last Jane Durie was the chief, having a *jus crediti* in this respect, and nothing else; a moveable subject disposable by testament, and falling to next of kin.

This view of the case is illustrated by the inconsistent consequences which would follow an opposite supposition, or that of any *pro indiviso* right in the specific portions of the testator's property.

*First*, The right of the legatees being evidently of the same description as that of the heir, they must, as far as it was deemed heritable, have made up titles by service, however anomalous the proceeding might be. Their representatives too, in the same way, must have been obliged to employ both service and confirmation; and this remark applies also to the creditors.

*Secondly*, If the right of those interested referred to the particular nature of the subjects that composed the estate, then, in consequence of the extensive powers of the trustees, a person's interest might have been rendered heritable one day, the next day moveable, and the third heritable again; and yet all this perhaps, both very proper management, and done without even his knowledge, much less any power of controul on his part.

*Thirdly*, Had the heritable debt been paid to the trustees but a day before Jane died, instead of a day or two after, the competitor could not have pretended any claim as heir; and were it not strange, that the right of her succession should depend upon such a casualty as that?

It was then a mere *jus crediti*, or claim of accounting, against the trustees, which resulted to all the persons indiscriminately who were interested in the deed. This conclusion is not a novelty in the practice of the Court; a point essentially the same having been so determined, 25th February 1780, Grierson *contra* Ramsay, No 84. p. 759.

In that case, a debtor having conveyed his heritable estate to a trustee, for behoof of his creditors, a creditor of one of them used arrestment in the trustee's hands; and it was found, that this was the habile diligence, and not adjudica-

No 117. tion; because the right of the creditors, by the trust-deed, resolved into a mere *jus crediti*; or, in other words, was accounted of a moveable nature; for such subjects only can be attached by arrestment; and it required the statute of 1661 to make that diligence effectual in respect to heritable bonds.

*Answered*; Had the heritable debt in question been directly conveyed to Jane Durie by the testator, it could not be disputed, that her right ought to be esteemed heritable. Now it surely cannot make any difference in this respect, whether a subject be held by the party interested, in his own name, or by a trustee for his behoof.

It is true, this debt was not vested in Jane Durie's person by a complete feudal title, and so far it may be said that her right resolved into a personal claim against the trustees, which was that of denuding in her favour. But the subject of her right really was an heritable debt secured by infestment on a land-estate in Scotland, which, as much as any thing could be, was *sua natura*, an heritable subject.

Even a personal right to an heritable subject is heritable. In the case, for example, of a disposition without infestment, or of a minute of sale, the right certainly is personal; yet it is not therefore moveable, or descendible to executors. In short, every right affecting land is properly heritable, whatever may be its nature, or whether it be completed in the feudal form or not.

In confirmation of this, an appeal may be made to the case of Douglas, Heron, and Company. Upon their issuing transferable bonds, certain heritable securities were vested in trustees for behoof of the creditors in the bonds. But it being understood, that the effect of this circumstance was to render the bonds an heritable subject, and so not disposable by testament, a clause was inserted in the act of parliament obtained on that occasion, declaring, that they should be deemed *personal* estate, so as to descend to executors, and be disposable by testament.

On the same principle, if a person's agent has, by his direction, lent out a sum of money for his behoof on the security of a land-estate, it becomes an heritable subject, and to be governed by the rules of law respecting heritage. And it is to be observed, that at the time of Jane Durie's death, the only period to be considered in this argument, the debt in question was heritable, though it was soon afterwards uplifted by the trustees.

The decision in the case of Grierson would indeed have been applicable at present, had it related to a competition between the truster's heir and executor, and if the subjects of the trust had been found to descend to the latter; whereas it respected only the claims of creditors, who, instead of having, like Jane Durie, a special title to those effects, had no farther interest than to obtain payment of their debts. Besides, from a subject's being arrestable, it does not follow, that it is likewise moveable and disposable by testament. Witness heritable bonds prior to sasine, and bonds secluding executors.

There was another question agitated at the same time. viz. Whether or not the disposal of the effects considered as moveable should be regulated by the law of England, being that of the domicile. But any elaborate discussion of it was superseded by the recent case of *Hog contra Hog*, No 116. p. 4619.

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THE LORD ORDINARY pronounced judgment as follows: "Having considered the memorials, &c. and the decision therein referred to; as also the late determination of the Court, in the question between Mr Hogg of Newliston and his sister, finds, that in virtue of the trust-disposition by Thomas Durie, the persons for whose behoof that disposition was granted, had not a *pro indiviso* share in the subjects conveyed to the trustees, but only a personal claim or ground of action against them to account: Finds also, that the moveable succession of Thomas Durie must be regulated by the law of the Isle of Man, not that of Scotland."

This interlocutor being brought under review, in a petition to the Court, with answers, a considerable part of the Judges adopted the argument for Mrs Durie, though that of the opposite party prevailed in the opinion of the majority.

"THE LORDS altered the first part of the interlocutor of the Lord Ordinary, and preferred Mr Coutts to the sums *in medio* due by the heritable security; but adhered to the last part of the Lord Ordinary's interlocutor, and found, that the moveable succession of Margaret Durie and Jane Durie fell to be regulated by the law of the Isle of Man, where they had their domicile at the time of their respective deaths."

A petition reclaiming against the former part of this judgment was refused without answers. See HERITABLE AND MOVEABLE.

Lord Ordinary, *Dreghorn*.  
Alt. Solicitor-General.

For Mrs Durie, *Rolland, M. Ross*.  
Clerk, *Home*.

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*Fol. Dic. v. 3. p. 224. Fac. Col. No 192. p. 397.*

1794. November 27. JEAN MACDONALD against ALEXANDER LAING.

WILLIAM MACDONALD, a native of Scotland, acquired a considerable plantation in Jamaica, where he had resided about fifteen years. In 1779, he was appointed lieutenant in the 79th regiment of foot, at that time quartered in the Island; he also got the command of a fort in it. In 1783, he obtained leave of absence for a year, that he might return to Scotland for the recovery of his health. He died a few months after his arrival. The 79th regiment was by this time reduced. He had no effects in Scotland, and his only property in England were two bills which he had transmitted from Jamaica before he left it, in order, as was said, to purchase various articles for his plantation.

His father intromitted with the funds in England.

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The succession of a Scotsman who had resided many years in the West Indies, where he had acquired a valuable plantation, but who had returned to his native country for the recovery of his health, and died